NO. 21891

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK CARLINO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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I

STATEMENT OF JURISDICTION

On August 3, 1966, appellant was indicted in one count by the Federal Grand Jury for the Southern District of California, Central Division, for transporting a stolen motor vehicle in interstate commerce in violation of Title 18, United States Code, Section 2312 - The Dyer Act [C. T. 2]. 1/ Following a jury trial before the Honorable Albert Lee Stephens, Jr., United States District Judge, from October 18, 1966 to October 20, 1966, appellant Frank Carlino

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1/ "C. T." refers to Clerk's Transcript.

was found guilty [C. T. 36].

Appellant was convicted and sentenced on November 14, 1966, to the custody of the Attorney General for four years [C. T. 42].

Appellant filed, on November 14, 1966, a Notice of Appeal [C. T. 44].

The District Court had jurisdiction under the provisions of Title 18, United States Code, Sections 3231 and 2312.

This Court has jurisdiction to review the judgment pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATUTE INVOLVED

Title 18, United States Code, Section 2312 provides:

> "Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

III

QUESTIONS PRESENTED

1. Whether the opening statement of the prosecutor caused reversible error.

2. Whether venue was proved.

3. Whether an instruction of the District Court Judge was reversible error and whether the issue was preserved on appeal.

4. Whether defendant was denied effective assistance of counsel.

IV

STATEMENT OF FACTS

On May 23, 1966, Thomas Cronin, an employee of Dollar A Day Rent A Car (in Los Angeles, California) rented a 1966 Ford to the appellant [R. T. 55-57]. 2/ As Exhibit 1, in evidence, shows, the car was to be returned on May 25, 1966 [R. T. 57]. At the time of the rental a $50 deposit was made and the appellant stated "he was going to need it [the vehicle] for a couple of days" [R. T. 58]. The contract was signed by appellant [R. T. 63].

By June 15 or 16, 1966, appellant met Kenneth Treece in Knoxville, Tennessee [R. T. 102]. At that time appellant had the relevant vehicle in his possession [R. T. 100], and within forty five minutes of appellant's meeting Treece, asked Treece to obtain license plates for the car [R. T. 102]. Appellant said he would "give anybody $50 to get him license plates" [R. T. 104]. At the same time appellant claimed ownership of the vehicle and stated that an attorney in Los Angeles had the ownership papers for the car [R. T. 102-03].

2/ "R. T." refers to Reporter's Transcript.

Later in June of 1966, appellant had the vehicle with him in Fairbanks, Alaska [R. T. 107-08].

Also in June of 1966, appellant had the car with him in Anchorage, Alaska, and within forty-five minutes of meeting Martin Gutwein, asked Gutwein about obtaining Alaskan license plates for the vehicle in question [R. T. 112-15]. At that time appellant told Gutwein that he was the owner of the vehicle and a lawyer had the bill of sale [R. T. 116-17].

In July of 1966, Arthur Willis noticed that his Alaska license plate number 46770 was missing [R. T. 119-121]. Said plate is the same as that found on the vehicle at the time of its recovery in Boulder City, Nevada, on July 21, 1966 [R. T. 186].

On July 15, 1966, appellant had the car in his possession in Boulder City, Nevada, bearing Alaska plates. On that date he told Larry McCollum, that he was the owner of the vehicle [R. T. 126-28]. At that time appellant stated he was going to Phoenix, Arizona, with the car, which direction is in the opposite direction of Los Angeles from Boulder City [R. T. 129].

On July 21, 1966, appellant was arrested in Phoenix and after being advised of his rights under the Constitution stated: (1) he drove the vehicle from Los Angeles to Fairbanks; (2) he made a $225 deposit on the car at the time of its rental; and (3) there was no limitation on the length of time he was to have the car [R. T. 132-35].

On August 4, 1966, upon being interviewed by a Special Agent of the Federal Bureau of Investigation, and after he was advised of

his rights under the Constitution, appellant stated: (1) he made a deposit on the rental of $275; (2) he had registered the vehicle in Alaska for 1966; and (3) he had not attempted to obtain plates for the vehicle in Tennessee [R. T. 152-54, 169]. The statement relating to registration in Alaska is to be compared with Exhibit 11, which proves that no such registration was made or obtained.

ARGUMENT

A.

THE PROSECUTOR'S OPENING STATEMENT DID NOT CONSTITUTE REVERSIBLE ERROR.

At page 46 of the Reporter's Transcript, the following appears:

"MR. MORROW: . . . Our next witness is Mr. Emmett Cochran, an employee of the State Prison System, a record keeper at Ithaca State Prison in New York.

"MR. OLLESTAD: Your Honor, wait a minute. I object to any of this evidence. And I object to the statement. I move for a mistrial at this time.

"THE COURT: The objection is sustained, but the motion is denied.

"Ladies and Gentlemen of the jury, you are instructed to disregard the statement of counsel in this connection. It is just as though it never had

been said. Completely disregard it . . . ."

At pages 50 and 98 of the Reporter's Transcript there appear offers of proof as to the matters sought to be proved by calling Mr. Cochran and similar records keepers -- (1) prior similar convictions, and (2) that Carlino is not the real name of the appellant.

The point raised on appeal is that the statement was prejudicial. There is no demonstration as to how the statement was prejudicial. If anything, the objection was made too soon for anything which might be considered objectionable to have been said.

It is submitted that the matters sought to be proved were entirely proper. Convictions for prior similar acts are admissible to show intent and identity. Nye & Nissen v. United States, 336 U.S. 618 (1949); Whaley v. United States, 324 F.2d 356 (9th Cir. 1963), cert. denied 376 U.S. 911 (1964); Henderson v. United States, 143 F.2d 681 (9th Cir. 1944).

Appellant in his brief offers the argument that "where proof of the commission of the offense charged carries with it the evident implication of criminal intent, evidence of the perpetration of other like offenses is inadmissible, . . ." [Appellant's Opening Brief, p. 1]. This Court has specifically ruled on said question. Even though intent may be inferred, "that fact does not prevent adding assurance of conviction with the proof of intent". Henderson, id., at 683. As a fleeting reading of the Reporter's Transcript shows, the only issue was the intent of appellant at the time of the subject

transportation.

Appellant alleges that no warning was given the trial court, and impliedly, the defense,of the Government's intent to introduce such evidence. The Government's Trial Memorandum, at C. T. 24, clearly shows that the trial court was informed of the matter. There would have been no point in stating the relative conviction record if it were only intended to be used for impeachment. The Reporter's Transcript, at page 52, shows that defense counsel knew of the convictions three weeks prior to trial. If defense counsel were truly concerned about the problem he could have asked for a hearing outside the hearing of the jury. From the absence of such a request, and in light of the knowledge of all parties, it was reasonable to assume that there would be no opposition to the introduction of such evidence.

B.

VENUE WAS PROVED

Appellant argues that the subject automobile must have been stolen when he left the State of California. No authority is cited for such proposition and it is noted that Riley v. United States, 359 F. 2d 850 (5th Cir. 1966), only requires that some transportation must have taken place within the District. Assuming, though, that it must have been stolen when removed from California, the evidence shows that appellant intended to steal it at the time of the rental. Appellant makes the invalid argument that he had two days of travel,

under the terms of the contract, in which the automobile could not be a stolen vehicle. If appellant intended to steal the vehicle at the time he rented it he was guilty of larceny by trick, and any subsequent interstate transportation would be a violation of the Dyer Act. United States v. Welborn, 322 F. 2d 910 (4th Cir. 1963); United States v. Turley, 352 U. S. 407 (1957). As appellant points out in his Opening Brief, at page 7, it is "realistic to assume that he would leave the state immediately and put as much distance as possible between himself and Los Angeles before the rental company became aware of its loss than to assume he would wait until the contract expired before absconding". Appellant is simply wrong in his interpretation that there could have been a two-day lapse before the vehicle would have become "stolen".

The Reporter's Transcript is replete with evidence that appellant intended to convert the automobile to his own use at all times since it came into his possession. There is evidence of statements of ownership by appellant, and his attempts to obtain and the actual obtaining of fraudulent license plates.

C.

THE TRIAL COURT DID NOT ERR IN ITS CHARGE TO THE JURY WITH RESPECT TO EXCULPATORY STATEMENTS LATER SHOWN FALSE AND THE POINT WAS NOT PRESERVED FOR REVIEW.

Rule 30, of the Federal Rules of Criminal Procedure, in part, states:

"No party may assign as error any portion of the charge or omission therefrom unless he objects thereto . . . stating distinctly the matter to which he objects and the grounds of his objection . . . ."

There is nothing in the record, and appellant cites nothing in his brief, that is such an objection. It is true that there was a stipulation that objections made prior to the charge would be deemed made after, but there was no proper objection to the subject instruction at any time. At pages 218-19 there is a discussion of the subject instruction, but no objection thereto.

Appellant takes exception to the giving of the standard instruction in the area, but not the proposition of law stated therein. The grounds for exception are stated as "defendant's exculpatory statements had not been proven false, and the trial court gave an instruction not warranted by the evidence (Opening Brief, p. 10). The instruction, as given by the trial court, is found at page 278 of the Reporter's Transcript. The instruction does not say the statements were false, but states if proven false then they may be considered as evidence pointing to a consciousness of guilt. As triers of the facts, it is the jury's duty to determine whether the statements were false. Appellant's argument is directed to whether or not they were in fact false, an argument better directed to the jury, and not this Court.

In any event, the instruction did not exceed the evidence. There were several statements made by appellant which were

proven false. He stated he made a $225 deposit on the car [R. T. 132-35]. He said there was no limitation on the time he was to have the car [R. T. 132-35]. He said he made a deposit of $275 on the car [R. T. 152-53]. He stated he registered the car in Alaska in 1966 [R. T. 154]. He stated he did not attempt to obtain Tennessee plates for the subject vehicle [R. T. 169].

The above statements were rebutted by competent evidence. The rental contract, Exhibit 1, proves that only a $50 deposit was made. The rental contract proves a two-day limitation on the time appellant was allowed to have the car. Exhibit 11 proves that appellant did not register the vehicle in Alaska. The testimony of Mr. Treece proves that appellant did attempt to obtain Tennessee plates for the car [R. T. 102].

D.

APPELLANT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BY THE TRIAL COURT'S NOT SENDING DEFENSE COUNSEL TO ALASKA.

Appellant, in his opening brief, assumes that his trial counsel was ordered not to go to Alaska and Nevada at Government expense. The assumption is ill founded. At one point in the pre-trial proceedings the trial court told appellant's trial counsel that he could go to Alaska. The record as it now stands is void of such proof. The record will be supplemented to provide such proof.

Whether or not appellant's trial counsel was allowed to go to

Alaska, there is no authority for such an expenditure. The Federal Rules of Criminal Procedure make no provision for such a trip, and the Criminal Justice Act makes no such trip available.

CONCLUSION

For the above stated reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Ronald S. Morrow
RONALD S. MORROW